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IN THE

Supreme Court of the United States

MOBIL CORPORATION and
HONEYWELL INTERNATIONAL, INC.,
Petitioners,

v.

BRUCE W. ATKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION

CHRISTOPHER J. WRIGHT *
TIMOTHY J. SIMEONE
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730-1300

* Counsel of Record

Additional Counsel listed on inside cover

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

JAMES F. HUMPHREYS
J. DAVID CECIL
JAMES A. MCKOWEN
JAMES F. HUMPHREYS
& ASSOCIATES, LC
United Center, Suite 800
500 Virginia Street, East
Charleston, WV 25301
(304) 347-5050

JOHN E. SUTTER
THE SUTTER LAW FIRM
1598 Kanawha Blvd., E.
Charleston, WV 25311
(304) 343-1514

JOHN SKAGGS
LAW OFFICES OF
STUART CALDWELL
405 Capitol Street, Suite 607
Charleston, WV 25301
(304) 343-4323

WILLIAM K. SCHWARTZ
HARVIT & SCHWARTZ, LC
2018 Kanawha Boulevard, East
Charleston, WV 25311
(304) 343-3100

SCOTT S. SEGAL
SEGAL LAW FIRM
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100

RONALD MOTLEY
ANNE MCGINNESS KEARSE
LAW OFFICES OF
NESS MOTLEY, P.A.
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9000

THEODORE GOLDBERG
DAVID B. RODES
GOLDBERG, PERSKY, JENNINGS
& WHITE, PC
1030 Fifth Avenue
Pittsburgh, PA 15219
(412) 338-9425

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is seriously incomeplete with respect to both questions purportedly presented by the petition. Although the first question presented states that the claims below were aggregated "without any inquiry into the commonality of those claims," they were in fact grouped together under West Virginia Trial Court Rule 26.01 only *after* a lengthy inquiry that included hearings, live testimony, findings, recommendations by a trial judge, and review by the Chief Justice of the Supreme Court of Appeals of West Virginia. The second question presented states that the court below held that West Virginia law will be applied to all of the plaintiffs' claims without identifying where the court made that holding. In fact, the State Supreme Court did not even address choice of law issues.

1. *The Asbestos Litigation Crisis.* As petitioners acknowledge, "[t]his country is in the midst of an 'asbestos-litigation crisis.'" Pet. 3 (quoting *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997)). The "litigation" crisis has arisen from an asbestos health crisis which resulted from manufacturing and industrial use of asbestos in products and premises long after its deleterious effects on human lungs became known. Although it is difficult to establish the precise number of asbestos-related suits nationwide, there were approximately 200,000 cases pending as of 1999. Pet. 3 n.2. Those cases are not, of course, evenly distributed across the fifty states; many are concentrated in areas, including West Virginia, where there are high levels of asbestos-related disease and mortality.[1] In 1996, the Supreme Court of Appeals of West Virginia found that the "sheer volume" of asbestos cases confronting the state's courts "threaten[ed] to cripple the common law system of adjudication" by "paralyzing the[] [lower courts'] active dockets." *West Virginia ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 303-04 (W. Va. 1996).

This Court has recognized the daunting nature of the asbestos-litigation problem. In *Amchem*, the Court quoted findings of the Judicial Conference Ad Hoc Committee on Asbestos Litigation that "dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether." *Amchem*, 521 U.S. at 598. As a result, state and federal courts have been "forced . . . to adopt diverse, innovative, and often non-traditional

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[1] West Virginia has the third-highest asbestosis crude mortality rate among the fifty states. Centers for Disease Control and Prevention *et al.*, *Work-Related Lung Disease Surveillance Report 1999*, figure I-5.

judicial management techniques to reduce the [paralyzing] burden of asbestos litigation." *Appalachian Power*, 479 S.E.2d at 304.

2. *Background of West Virginia Trial Court Rule 26.01.* Contrary to petitioners' suggestions, neither West Virginia Trial Court Rule 26.01 nor the procedures preliminarily contemplated by the pre-trial orders represent a break with the state's past practice in asbestos litigation. Rather, those procedures directly reflect the "specialized approach to the asbestos personal injury litigation" that has been developed by the West Virginia courts "over the past twenty years," and repeatedly and successfully applied by those courts to resolve "tens of thousands of asbestos-related claims." Pet. App. 24a-25a. The heart of that approach has been to sever, for initial trial, certain "issues that are common to all or almost all of the parties." Report of Judge Gaughan, Sept. 6, 2001 ("9/06/01 Report"); *see also* Pet. App. 25a. Subsequent proceedings, involving small groups of plaintiffs and their "common defendants," then address remaining issues, including those relating to exposure, causation, and damages. Pet. App. 28a-29a.

The "common-issues trial" approach to asbestos litigation has been used in West Virginia at least since 1989, although it was first approved by the State Supreme Court in *Appalachian Power* in 1996. "Common issues" trials on product liability claims have generally involved determine-ation by a single jury of whether (and during what time period) each supplier defendant's products were defective. "Common issues" trials on premises liability claims have been designed to determine whether (and during what time period) each premises defendant failed to maintain a reasonably safe workplace.

In *Appalachian Power*, the State Supreme Court found that while this "common issues" approach represented a "novel method of fact resolution," nothing about it was inherently

prejudicial to the defendants and, indeed, that "there [was] much in the Plan to recommend it to all parties because it represents an effective and efficient manner to bring closure to these [more than one thousand] cases without depleting valuable resources in the event that they are needed to satisfy a monetary award." 479 S.E.2d. at 305. Much of the efficiency derives from the elimination of repetition of certain witnesses and evidence. As one of the judges who presided over the *Appalachian Power* litigation observed in connection with his earlier experience of claim-by-claim asbestos litigation: "The anatomy of an asbestos trial, about 50 percent of it, never changed. It was exactly the same, every case . . . . [Y]ou'll have a little scientific evidence on what [asbestos] is, and then how does it hurt somebody if it's inhaled. And then you've got this big body of state of the art evidence, . . . the information about who knew what when, or when certain knowledge was available. . . . [W]ith respect to each defendant, what they knew and when they knew it determines their liability. That is repeated every time a case is tried, time and time again." 11/08/00 Tr. 56-57.[2]

"[T]o fully utilize" the concept of "common-issues" trials, the *Appalachian Power* court "assigned three circuit court judges to preside over [common-issue] trials of [all] those asbestos-related cases which were [then] pending on the dockets of circuit courts throughout the state." *West Virginia*

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[2] With respect to Mobil's contentions, efficiency would be gained by determining once, for all of the affected cases, whether the asbestos in Mobil's products really was encapsulated in a manner that precluded the release of fibers into the air, rather than having that issue (and others like it) determined separately in hundreds of repetitive individual trials. The automobile manufacturer defendants (DaimlerChrysler Corp., Ford Motor Corp. and General Motors Corp.) recently sought transfer of many thousands of asbestos claims across the country in order to obtain a consolidated determination of a similar encapsulation defense. *See In re: Federal-Mogul Global, Inc.*, 2002 U.S. App. LEXIS 15331 (3d Cir. Jul. 31, 2002).

ex rel. Allman v. MacQueen, 551 S.E.2d 369, 371 (W. Va. 2001). Pursuant to that order, a series of six common-issue "trials were held in Kanawha County and Monongalia County, with the last [of these] common-issue trials held in 1998." *Id.* at 371 & n.6. Those six trials "resulted in the resolution, in whole or in part, of what is estimated to be over 20,000 asbestos-related cases." *Id.* n.6.

West Virginia is by no means alone among the states in its use of common-issue trials to successfully manage the enormous caseloads created by asbestos litigation. The Maryland courts, for example, ordered the consolidation of more than 8,500 individual actions, initially involving over 100 different defendants. *See ACandS v. Godwin*, 667 A.2d 116, 120 (Md. 1995). The Maryland litigation—like the preliminary case management plan in the present case—divided the proceedings into phases, the first of which resolved "common issues" related to negligence and strict liability. *Id.* at 144-45. As here, questions specific to individual plaintiffs and defendants, including issues of causation and damages, were left to subsequent phases of the litigation. *Id.* at 121.

The Maryland Court of Appeals rejected defendants' claim that the "common issues" approach denied them due process—a claim based on the allegation that "the 8,555 plaintiffs in the consolidation have different occupations, were exposed at different times, at different workplaces, have different diseases, and different medical histories." *Id.* at 146. Specifically, the Court of Appeals found that "none of these factors diminishes the commonality of the Phase I issues." *Id.* Citing a long history of state and federal asbestos cases in which consolidation and common-issues trial methods had been used and upheld on appeal, the Court of Appeals found it "senseless to repeat the presentation of the same evidence against the same defendants in successive, individual trials or mini-consolidations." *Id.* at 146-49.

3. *The Operation of TCR 26.01.* Following the resolution of the Kanawha and Monongalia County cases, the State Supreme Court developed a generalized procedure "by which [alternatives to the traditional case-by-case trial] could be examined [in various mass litigation situations] and appropriate trial management plans could be developed." *Allman*, 551 S.E.2d at 371. That generalized procedure is set forth in Trial Court Rule 26.01, adopted by the court in July 1999. *See id.* at 371 & n.7.

Rule 26.01 establishes a permanent "Mass Litigation Panel" ("Panel") consisting of six circuit judges appointed by West Virginia's Chief Justice to three-year terms. Pet. App. 36a (TCR 26.01(a)). The rule confers on that Panel the same powers exercised by the judges appointed in Kanawha and Monongalia County cases to "develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of [such] litigation." *Id.* (TCR 26.01(b)). Rule 26.01 also sets forth procedures for referring cases to the Panel. Specifically, any party, judge, or the administrative director of the West Virginia courts may file a motion seeking referral of actions to the Panel. The motion must identify, *inter alia*, "the nature of the actions sought to be referred," the "basis for the request," and "a listing of the particular cases in all the circuits for which a referral is being requested." *Id.* (TCR. 26.01(e)). That motion must be "served on all the parties, all judges in actions which are the subject of the motion, and the Administrative Director." Following service, "[a]ny party shall have twenty (20) days . . . to file a reply memorandum stating its position and opposition, if any." *Id.* "Any affected judge may file a reply memorandum within ten (10) days thereafter." *Id.* Finally, after the filing of a motion and replies, the Chief Justice of the State Supreme Court may either act directly on the motion or recommend a hearing to inquire further into the desirability of the proposed referral. *Id.*

4. *The Present Proceedings.* The present petition involves cases brought by approximately 8,000 asbestos plaintiffs referred to the Mass Litigation Panel pursuant to a motion under 26.01(e). That motion, filed by two West Virginia circuit court judges in June 2000, was referred, together with opposing memoranda, by the Chief Justice to a trial judge "for the purpose of conducting a hearing and submission of findings of fact and a recommendation to the Chief Justice regarding the motion to refer." 11/17/00 Administrative Order at 1. In October 2000, the judge held a status conference to determine goals for the hearing, and determined that an inquiry into common issues of law and/or fact would be a critical issue. At the hearing in November 2000, the judge heard lengthy argument and testimony on that subject. Counsel for one defendant argued that the cases should not be referred because they lacked sufficient "commonality," while a representative for most of the remaining defendants indicated that "there are some common issues and that there is a basis, under Rule 26 . . . for [a referral to the Panel]." 11/08/01 Tr. 46. Following the hearing, the Chief Justice issued an administrative order accepting the recommendation that the referral motion be granted. 11/17/00 Administrative Order.

The trial judge initially assigned to develop a case management plan for the referred cases developed a plan that called for a series of traditional trials on "all issues" between small groups of plaintiffs and defendants. Both plaintiffs and defendants sought extraordinary relief from the West Virginia Supreme Court to prevent this plan from going into effect. The State Supreme Court ruled that the challenged case management plan did not "fully meet" the need for a "fair[] and expeditious[]" approach to resolving the pending asbestos cases, and set forth a "fourteen-point directive for the trial court [to follow] in connection with the management of these cases." *Allman*, 551 S.E.2d at 375-78; *see also* Pet. App. 4a.

After that decision, the West Virginia Chief Justice designated a new supervising judge, who met with counsel representing plaintiffs and defendants and, in September 2001, adopted a "Report" setting forth the general approach to case management that he intended to adopt. In particular, the Report canceled the "all issues" trials that were previously scheduled and contemplated that all cases not successfully mediated by March 4, 2002 would be categorized into three groups and scheduled for initial trials of "issues that are common to all or almost all of the parties" within each group—precisely as had been done in the similar Kanawha and Monongalia County cases. Report at 6. The Report noted, however, that "the trial plan has not been solidified," and that the judge would continue "to develop a process which will eliminate the need for repetitive discovery depositions, interrogatories, requests for admissions, etc." Report at 8.

After the issuance of the September 2001 Report, Mobil filed a motion in the State Supreme Court seeking a writ of mandamus or prohibition to prevent implementation of the Report's provisions. Mobil claimed that the trial court's failure to conduct an evidentiary hearing pursuant to W. Va. R. Civ. P. 42 on the question whether "mass litigation" could provide a fair determination of the claims presented was clear error—notwithstanding that the question whether "mass litigation" treatment was appropriate for these cases had already been the subject of a motion, memoranda, hearings, and a determination by the Chief Justice under Rule 26.01(e).

In February 2002, the trial court issued a "Scheduling Order" ("Order") further developing the case management plan. That Order indicated that the court planned to implement a "trial format . . . substantially identical to the previous consolidated 'mass trials' [in Kanawha and Monongalia Counties]." Pet. App. 25a. Specifically, the cases would be divided into three groups reflecting the "general types of causes of action asserted by the plaintiffs":

"(1) product liability claims; (2) premises liability claims; and (3) claims by employees against their employers under the provisions of W. Va. Code § 23-4-2." Pet. App. 25a. The Order also indicated that the first phase, or "common issues" phase, of trial would be targeted to "determin[ing] the common issues of fault" within those groups of cases. *Id.* at 26a. The Order emphasized that, as in the earlier common issues trials, the "common issues" phase of trial for products liability claims would require the jury to make individualized findings as to each defendant, including "whether and for what time period [that defendant] sold or distributed a defective asbestos-containing product." *Id.* The specific "common issues" to be tried were, however, left for future determination.

The Order also addressed additional proceedings to be held after the close of the "common issues" phase of trial. Specifically, the court indicated that "[n]ew juries" would be impaneled for "mini-trials" as to causation and damages. Pet. App. 28a. These mini-trials "will consist of a number of plaintiffs against their common defendants," with the groups "based on causes of action, geographic locations, and similar exposure criteria." *Id.*

5. ***The Decision of the State Supreme Court.*** In April 2002, the State Supreme Court issued an opinion addressing Mobil's request for a writ of mandamus or prohibition to prevent further development and implementation of the preliminary case management plans set forth in the Report and the Order. The court first rejected Mobil's argument that the trial court was obliged to hold an evidentiary hearing pursuant to W.Va. R. Civ. P. 42 as to whether these cases were appropriate for consolidation. The court explained:

> Mobil overlooks the fact that the purpose of those findings [is] only to make the *initial* determination of whether the cases should be grouped together for trial purposes. With the operation of TCR 26.01, the

> determination of the need to group cases as "mass litigation" for trial purposes is made through a process that operates in a distinct fashion. . . . Because this Court has previously approved the treatment of the current asbestos cases under the mass litigation rule, there is no reason to reexamine whether these cases should have been grouped together in the first instance. We are long past the initial determination, which was reached by this Court in November 2000, that these cases can, based on the existence of common factual and/or legal issues, be grouped together for trial purposes.

Pet. App.13a.

The court then turned to an analysis of Mobil's claim that pursuing a "common issues trial" approach to these cases would necessarily abridge Mobil's due process rights. This claim, the court concluded, was "simply premature":

> Because the trial court has yet to finalize the specifics regarding identification of the common issues that will be the focus of the initial liability phase of the litigation, Mobil's contention of a denial of Due Process predicated on the lack of commonality of the issues subject to the liability phase is simply premature. We cannot, in advance of any such final determination of these common issues, resolve Mobil's speculative, and possibly unrealized, claims of Due Process violations.

Id.

Not surprisingly, the State Supreme Court did not address Mobil's claim that "consolidation" of these asbestos cases under Rule 26.01 was "unsuitable" because it would require the trial court to confront difficult choice of law issues. As the State Supreme Court was well aware, the trial court—which had not yet even finalized its case management approach—had not yet reached a point in the proceedings where it would have been appropriate to consider choice of law issues. Indeed, the September 2001 Report and February

2002 Order did not contain a single word addressing choice of law. Accordingly, on this issue, there was nothing for the State Supreme Court to review.

One justice of the State Supreme Court issued a concurring opinion expressing reservations, and sharing Mobil's concern that the trial judge ultimately would be unable to successfully negotiate what he termed the choice of law "minefield." Pet. App. 22a. But the concurring justice nonetheless concluded that "at this juncture at least, Mobil's claims of due process violations are premature because the trial court has not completed its trial plan." *Id.* at 19a.

On August 12, 2002—more than eight months after Mobil filed its petition for review with the State Supreme Court and more than three months after the State Supreme Court issued the decision under review—the trial court addressed the choice of law issue. One of the judges presiding over the "common issues" phase of trial ruled that the judges intended to "apply West Virginia law in all aspects of the first phase [the 'common issues' phase] of this trial." 8/12/02 Tr. 172. He then expressly stated that "to the extent that anybody is aggrieved by that, your objection is noted and preserved" for appeal. *Id.* He also clarified that the ruling did not apply to later phases of the trial: "Right now we are dealing with Phase I. Nobody should read anything into that [choice of law ruling] one way or another" as to later phases. *Id.* at 173.

At the August 12, 2002 hearing, the trial court also addressed the question—deferred by Judge Gaughan's February 2002 Order—of what "common issues" would be tried during Phase 1. Judge Recht indicated that, for the premises cases, the "common issues" questions would essentially track those used in the *Allman* case. 8/12/02 Tr. 218. Judge Stephens indicated that Phase 1 of the manufacturers' trial would proceed based on eleven common

issues identified by plaintiffs. *Id.* at 174-76.[3] As in the earlier product liability trials in the Kanawha and Monongalia County cases, those questions focus the jury's attention on whether (and during what time period) each supplier defendant's products were defective, as well as related issues such as the need for and adequacy of warnings.

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to review the State Supreme Court's decision not to grant a writ of prohibition. At the time the court entered the judgment at issue, the trial court had not yet decided what common issues would be tried in the first phase of the proceedings or what law would be applied. The court below properly declined to issue an extraordinary writ in those circumstances, but instead correctly concluded that it did "not find the issues ripe for review." Pet. App. 18a. Accordingly, there is no important issue of federal law warranting review by this Court. Nor is there any conflict warranting review. In addition, the interlocutory posture of this proceeding counsels strongly against review by this Court. In fact, there is no final judgment for this Court to review, which is a prerequisite for review by this Court of a state court decision.

I. THE INTERLOCUTORY DECISION OF THE STATE SUPREME COURT IS NOT A REVIEWABLE "FINAL JUDGMENT."

Petitioners ask this Court to review the judgment below even though no trial has been held and no defendant has been found liable. As this Court recently emphasized, however, the statutory provision governing review of state court decisions, 28 U.S.C. § 1257(a), "establishes a firm final judgment rule." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81

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[3] As Judge Stephens noted at the hearing, the defendants had declined to identify any common issues. 8/12/02 Tr. 176.

(1997). To be reviewable, a state court judgment must "be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Id.* Plainly, the decision below is not final as an effective determination of this litigation. This case presents no unusual circumstances warranting a departure from this Court's long-established practice of respecting Congress' command that it not intrude into litigation pending in state courts.

The requirement of finality "serves several ends: (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973). Each of these ends is implicated in this case. First, the preliminary nature of this case creates a strong likelihood of piecemeal appeals. Second, a decision by this Court in the present procedural posture is all too likely to be merely advisory, as the issues to be tried, the law to be applied, and the number of defendants going to trial remain subject to change. Third, the review sought by petitioners would amount to an unprecedented intrusion into state court affairs. The State Supreme Court declined to exercise its discretion to review an interim scheduling order because it believed that such interlocutory review would be premature and that any issues not obviated through the actual course of events at trial are likely to be presented more sharply upon a full record. To hold that a state supreme court commits constitutional error by declining to grant extraordinary relief at an interlocutory phase would seriously intrude on the autonomy of state judiciaries.

Although this Court's firm final judgment rule has been in effect "[f]rom the earliest days of our judiciary," *Jefferson*, 522 U.S. at 80, on a very few occasions the Court has

reviewed judgments of state courts where proceedings had not necessarily ended completely. But those cases were very different than this case. Two of the three cases cited by petitioners involved jurisdictional claims that could have ended the litigation. The dispute in *Madruga v. Superior Court*, 346 U.S. 556, 557 (1954), was whether a state court had jurisdiction over a "case for sale of a vessel and partition of the proceeds," or whether "only the United States district court sitting in admiralty could take jurisdiction to consider such a case." Similarly, *Fisher v. District Court*, 424 U.S. 382, 383 (1976), presented the question whether a state court, rather than a tribal court, "has jurisdiction over an adoption proceeding in which all parties are members of the Tribe and residents of the Northern Cheyenne Indian Reservation." Citing *Madruga* and noting that the dispute had been brought to the Montana Supreme Court as an original proceeding seeking an extraordinary writ, the Court in *Fisher* held that "[a] judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final, even if further proceedings are to be had in the lower court." *Id.* at 385 n.7.

This case, like *Madruga* and *Fisher*, arises from a request for an extraordinary writ. But unlike those cases, the jurisdiction of the state court is not at issue and no decision by this Court could have the effect of ending the litigation. At most, petitioners would obtain a judgment from this Court providing guidance on how the trials should be structured and how choice-of-law issues should be resolved. Accordingly, concluding that the decision below is a final judgment would stretch the language of section 1257 far beyond the modest steps this Court has taken in permitting review in unusual cases, and far beyond any sensible meaning of the final judgment language. Indeed, the result petitioners seek would inappropriately relegate section 1257's final judgment rule to

the status of "one of those technicalities to be easily scorned." *Jefferson*, 522 U.S. at 81 (citation omitted).[4]

Recognizing that this Court is reluctant to review cases in an interlocutory posture even where the finality requirement governing state court decisions is not implicated, petitioners argue that they will have to settle because "the underlying claims assert potentially serious personal injuries," Pet. 28, and suggest that review at this time is appropriate for that reason. There is no merit to that contention. Mobil and Honeywell are represented by expert counsel who will have the opportunity to defend their clients on the merits at the appropriate stage of the further proceedings. If their defense is as sound as Mobil suggests, *see* Pet. 4-5, they should proceed to trial.[5] If they are not as sure as the petition

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[4] In addition to *Madruga* and *Fisher*, petitioners cite then-Justice Rehnquist's in-chambers opinion in *Board of Education v. Superior Court*, 448 U.S. 1343 (1980). In the course of denying the requested stay of a busing order, the in-chambers opinion noted that the stay action was an original proceeding seeking an extraordinary writ and stated that "this Court would in all probability have jurisdiction over the present action should a petition for certiorari be filed by the Board." *Id.* at 1346. It appears that the relief requested by the Board would have effectively terminated the busing dispute entirely because the Board argued that any busing in the Los Angeles Unified School District would violate the Fourteenth Amendment. Therefore, the tentative prediction that the Court would have jurisdiction may have been correct. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975) (recognizing that certiorari has been allowed despite the pendency of further state proceedings where, *inter alia*, "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of . . . the state proceedings still to come"). The the in-chambers opinion hardly provides support for the broad extension of section 1257 sought by petitioners, however, since there is no prospect that a decision from this Court will end the litigation entirely.

[5] Of course, petitioners may challenge decisions concerning trial structure and choice-of-law in this Court at an appropriate time. *See* R. Stern *et al.*, *Supreme Court Practice* 155 (8th ed. 2002). They also may

suggests that the asbestos in the products Mobil manufactured could not escape and cause serious injury, they should consider settling.

But requiring the plaintiffs, many of whom have suffered serious personal injury, to litigate one at a time against each defendant—as Mobil argued below (*see* note 6, *infra*)—is not an acceptable solution. As this Court recognized in *Amchem*, 521 U.S. at 598, that approach would lead to "long delays" before trial and to trials that "are too long" because "the same issues are litigated over and over."

II. THE FIRST QUESTION PRESENTED DOES NOT WARRANT REVIEW.

A. The State Supreme Court *Did Not Hold* That Thousands Of Claims Could Be "Aggregated For A Mass Liability Trial" Without "Any Inquiry Into The Commonality Of Those Claims Or The Prejudice That Would Result From Such An Extraordinary Undertaking."

Petitioners first argue that this Court should review the State Supreme Court's purported holding that "mass aggregation for trial requires no inquiry into commonality or potential prejudice." Pet. 13. But the decision below did not "hold" any such thing. To the contrary, the court confirmed its earlier determination, made "in November 2000, that these cases can, based on the existence of common factual and/or legal issues, be grouped together for trial purposes." Pet. App. 13a.

As described above, that determination was the result of a lengthy process required by Rule 26.01 to ascertain whether sufficient commonality existed in these cases to justify

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again raise the issues presented in their petition, *id.*, although it seems certain that actual decisions will supersede the hypothetical questions presented.

"group[ing them] together for trial." *Id.* The process began in August 2000, when the West Virginia's Chief Justice referred the Rule 26.01 motion to a trial judge "for the purpose of conducting a hearing and submission of findings of fact and a recommendation to the Chief Justice regarding the motion to refer." 12/21/00 Administrative Order at 1. It included a status conference in October 2000 at which one of the attorneys for defendants stated that "as the paperwork that we filed on behalf of most defendants [indicated] . . . we like the idea of having a statewide coordinated effort to deal with" these asbestos cases. 10/17/00 Tr. 10. Another defendants' lawyer, representing "nontraditional defendants in [] asbestos litigation," agreed that the best way that this "asbestos litigation . . . [can be] handled . . . [is] through a coordinated effort at the Mass Litigation Panel." 10/17/00 Hearing at 33. But other defendants' attorneys disagreed, and the judge concluded that "the major issue" for a subsequent hearing would be whether the cases "generally come in" under Rule 26.01, that is, "[d]o they involve a common question of fact, common issues?" *Id.* at 23.

The transcript of the November 8, 2000, hearing addressing that "major issue" runs to more than 100 pages. As anticipated, that hearing—attended by counsel for both petitioners—focused primarily on the question of commonality. Counsel for USX and CSX Transportation and Norfolk Southern Railway Company argued that the cases do not present the commonality required by Rule 26, and presented live witnesses testifying in support of that position. However, counsel speaking "on behalf of most of the defendants" presented a contrasting view, stating that "defendants do believe that there are some common issues and that there is a basis, under Rule 26 . . . for the handling of asbestos cases with a referral to the Mass Litigation Panel." 11/08/00 Tr. 45, 46. Counsel for petitioners did not disagree.

In findings of fact and conclusions of law submitted to the Chief Justice on November 15, 2000, the trial court found that

"[t]he plaintiffs and defendants, with the exception of USX and CSX, generally agreed that the cases should be sent to the mass litigation panel." 11/17/00 Order at 2. He acknowledged, however, that "USX and CSX specifically object to their cases being referred with the other asbestos cases. These defendants believe that their cases are not significantly similar as is required by the rule." *Id.* The judge's conclusions of law rejected that argument, however, recommending that "all pending asbestos litigation in the state of West Virginia" be referred to the Mass Litigation Panel. *Id.* at 3. On November 17, 2000, West Virginia's Chief Justice issued an order adopting the lower court's findings and conclusions, and requiring that "[w]ithin 10 days of the entry of this order the plaintiffs in this matter and the defendants in this matter shall each appoint seven representatives to meet with the Mass Litigation Panel to develop specific rules and strategies to deal with the disposition of these cases." *Id.* at 4.

Against this backdrop—entirely omitted by petitioners—it is obvious that the State Supreme Court did not "hold" that referring these cases for consolidated treatment under Rule 26.01 does not require "any inquiry into the commonality of those claims." To the contrary, Rule 26.01 itself requires such an inquiry, and a lengthy inquiry was, in this case, conducted. In rejecting Mobil's claim that the trial judge was required to conduct *another* such inquiry under W.Va. R. Civ. P. 42, the State Supreme Court merely held that "[b]ecause this Court [through the Chief Justice's 11/21/00 Order] has previously approved the treatment of the current asbestos cases under the mass litigation rule, there is no reason to reexamine whether these cases should have been grouped together in the first instance. We are long past the initial determination, which was reached by this Court in November 2000, that these cases can, based on the existence of common factual and/or legal issues, be grouped together for trial purposes." Pet. App. 13a.

B. Petitioners Will Be Entitled To Seek Review Of Their Claim That A "Common Issues" Trial Violated Their Due Process Rights When The Facts Necessary To Rule On That Issue Have Been Established.

Distinct from petitioners' incorrect claim that the court below held that no inquiry into commonality of issues was required is their suggestion that *any* common issues trial would necessarily violate their due process rights. The petition argues, for example, that a "common issues" approach will "make it impossible for a defendant like Mobil to assert its unique defenses in a meaningful way," thereby violating due process. Pet. 18.[6] As the State Supreme Court correctly held, however, the question whether a "common issues" trial will, at some future time, result in due process violations cannot be addressed in the absence of information that clearly did not exist at the time of the State Supreme Court's review.

The propriety of a "common issues" approach will, of course, depend on factors including the precise common issues tried, the manner and extent to which individual defendants are allowed to present what Mobil terms "unique" defenses, and the means used to obtain from the jury individualized determinations on the issues tried as to each defendant. As the State Supreme Court correctly concluded,

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[6] In its brief to the State Supreme Court, petitioner Mobil put the same point far more starkly, arguing that "individual treatment . . . of each plaintiff's claim is the *only constitutional manner in which to proceed in asbestos*" actions." 12/21/01 Memorandum of Law at 31. When stated so plainly, Mobil's argument is clearly an effort to avoid *any* adjudication of the vast majority of asbestos plaintiffs' claims. As the State Supreme Court pointed out in 1996 in *Appalachian Power*, the disposition of then-pending asbestos cases through "traditional" litigation would have required "approximately 150 judge years." 479 S.E.2d at 303 (citing Jack B. Weinstein, Individual Justice in Mass Tort Litigation 140 (1995)). Such enormous resources are simply unavailable.

however, at the time of the decision below, the trial court had yet to address even the first of these important questions—the identification of "common issues" to be tried.[7] "Because the trial court has yet to finalize the specifics regarding identification of the common issues that will be the focus of the initial liability phase of the litigation," the court below held, "contention of a denial of Due Process predicated on the lack of commonality of the issues subject to the liability phase is simply premature." Pet. App. 15a. The court concluded that it could not, "in advance of any such final determination of these common issues, resolve Mobil's speculative, and possibly unrealized, claims of Due Process violations." *Id.*

For the same reason, petitioners' pursuit of this issue before this Court is premature as well. If the injury claimed by petitioners ever progresses from the realm of the purely hypothetical to the actual, they will, of course, at an appropriate time be entitled to seek the review that the State Supreme Court has thus far deemed it unnecessary to provide. And if petitioners' disagree with the result of that review, they will, of course, be free to seek this Court's review. For the moment, however, review of petitioners' claim that a "common issues" trial will violate their due process rights is, as the court below stated, "simply premature" because the facts necessary to rule on that claim have not yet been established.

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[7] As set forth above, that question was not addressed until months *after* the decision below, at a hearing on August 12, 2002. *See supra* at 11-12.

C. The West Virginia Courts' Preliminary Plan To Employ "Common Issues" Trials Followed By Small-Group Trials On Remaining Issues Is Entirely Consistent With The Federal Circuit Court And State Intermediate Appellate Court Cases Cited By Petitioners.

Petitioners maintain that the State Supreme Court's "holding" that "mass aggregation" of cases "requires no inquiry into commonality or potential prejudice" conflicts with decisions of other courts." Pet. 13. There is no conflict.

Petitioners' lead case, *Garber v. Randell*, 477 F.2d 711 (2d Cir. 1973), has little in common with the decision below. *Garber* involved a trial court order requiring that three shareholder derivative class actions be re-filed in a single consolidated complaint, "which superseded the complaints filed in the three separate actions." 477 F.2d at 716. The Second Circuit held that the lower court had erred in mandating a single "'mixed bag' type of consolidated complaint."

The *Garber* holding is irrelevant here because the trial court's Report and Order did not require or have the effect of requiring that all asbestos cases in West Virginia be refiled in a single, consolidated complaint. To the contrary, the trial court's preliminary rulings indicate that the separate cases will be divided into three categories for the identification of "common issues" within each category amenable to trial in an initial "common issues" phase of litigation; the cases will then be separated into groups consisting of "a number of plaintiffs against their common defendants"—with the groups "based on causes of action, geographic location, and similar exposure criteria"—for trial of remaining issues. Pet. App. 28a. Nothing in *Garber* is inconsistent with that approach.

Malcolm v. Nat'l Gypsum Co., 995 F.2d 346 (2d Cir. 1993), is equally irrelevant here. That appeal challenged a ten-month, "reverse-bifurcated" (damages, followed by

liability) trial of *all* the issues between 48 plaintiffs and 25 direct defendants, as well as hundreds of third-party defendants and fourth-party defendants added via impleader. 995 F.2d at 349-50. In the first phase of trial, to decide damages, the jury was presented with "detailed testimony for each victim," including "degree of impairment, specific medical history, emotional state, and medical prognosis." *Id.* at 349. The Second Circuit found that the "the maelstrom of facts, figures, and witnesses, with 48 plaintiffs, 25 direct defendants, numerous third-and-fourth party defendants, and evidence regarding culpable non-parties and over 250 worksites throughout the world was likely to lead to jury confusion." *Id.* at 352. It emphasized that its holding was "narrow," and that it did "not wish to be understood as condemning all consolidations of asbestos cases." *Id.* at 354. The court also underscored the significance of the "unique circumstances of this case" in reaching its decision, and relied on the jury's actual verdict with regard to apportionment of liability as evidence of the confusion suggested. *See id.* at 352.

The decision below does not contemplate such an "all issues" trial (or resulting "maelstrom"). As noted above, the preliminary plan approved by the court below calls for an initial phase of trial on a limited number of discrete "common issues" relating primarily to what defendants knew and when they knew it, followed by "mini-trials" between parties grouped together based on precisely the kinds of factors examined by the *Malcolm* court on the issues remaining. Pet. App. 28a. *See Malcom*, 995 F.2d at 350-51. *Malcolm* did not consider, and certainly would not prohibit, this approach.

The Fifth Circuit cases cited by petitioner are still more obviously inapposite. *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997), involved thousands of personal injury claims against Chevron arising from its failure to remediate contaminated property prior to selling it to residential

developers. The trial court's case management plan envisioned a "unitary trial on the issues of 'general liability or causation' . . . as well as the individual causation and damage issues" to be held with respect to thirty "bellwether" plaintiffs. *Id.* at 1017. Those plaintiffs would comprise "fifteen (15) of the 'best'" (selected by plaintiffs) and "fifteen (15) of the 'worst'" (selected by defendants) cases contained among the 3,000-member plaintiff group, and the results of that trial would be used to provide information on the value of the cases (as reflected by the jury verdicts) to remaining litigants wishing to settle.

The Fifth Circuit held that the "selected thirty (30) cases . . . are not cases [properly] calculated to represent the group of 3,000 claimants." *Id.* at 1020. Accordingly, the court found, "the results . . . obtained from a trial [would] lack the requisite level of representativeness" to permit reliable inferences to be drawn regarding the remaining cases. *Id.* The "common issues" approach contemplated by the West Virginia courts clearly has nothing in common with the "bellwether" approach disapproved by the Fifth Circuit.

Gwathmey v. United States, 215 F.2d 148 (5th Cir. 1954), is equally far afield. It involved consolidation to establish the value of 236 tracts of land condemned by the federal government in the Cape Canaveral area. This consolidated action attempted to establish the value of all of these parcels in "one massive trial, in which the jury . . . ma[d]e no decision until the completion of all the evidence," presentation of which took "some seven weeks" on the "issue of value alone." *Id.* at 152. The court expressed concern that the trial placed landowners in an "impossible situation." *Id.* at 154. For example, although attorneys and owners often were not present when tracts in which they were not interested were being tried, "Government witnesses repeatedly testified as to comparable sales, physical conditions and other value factors relating to one tract while another

completely separate tract was being tried." *Id.* As a result, "the Government was able repeatedly to restate and emphasize certain of its evidence as to some controversial areas, with cross-examination either not allowed or allowed so long after direct examination that it was totally ineffective." *Id.* The court further observed that "during the trial there were so many tracts and so much evidence that the witnesses, the attorneys and even the judge himself seemed to be confused at times," and concluded that, for these and other reasons, the trial violated the rights of landowners to due process and just compensation. *Id.* at 156.

In the present case, it is obvious that no comparable problems have arisen because no trial has yet occurred. And nor is there any reason to think that similar problems will occur—as repeatedly noted above, the preliminary plans approved by the court below call for a "common issues" phase of litigation addressing a limited number of discrete questions relating to defendants' knowledge of the risks of asbestos and the actions they took (or should have taken) as a result, followed by additional phases of "mini-trials" to address remaining issues, including damages. Petitioners have not presented—and, given the preliminary state of this proceeding, could not now present—any evidence to suggest that the problems noted by the *Gwathmey* court will recur here. Accordingly, there is not—and, at this time, could not be—a conflict between this case and *Gwathmey*.

The state court cases with which petitioners claim "conflicts" merit little consideration. Supreme Court Rule 10(b) lists among the reasons the Court considers for granting certiorari situations where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort." But the rule says nothing of decisions by state intermediate appellate courts. Nor should it—such decisions are properly subject to review, in the first instance, by the "state court of

last resort," not this Court. Yet *Todd-Stenberg v. Dalkon Shield Claimants Trust*, 56 Cal Rptr.2d 16 (Cal. Ct. App. 1996), and *Union Pac. Res. Group, Inc. v. Hankins*, 51 S.W.3d 741 (Tex. Ct. App. 2001), are obviously intermediate court of appeals decisions. Accordingly, they would present no basis for review by this Court even if they presented an actual conflict with the decision below.[8]

III. THE SECOND QUESTION PRESENTED DOES NOT WARRANT REVIEW.

A. The Supreme Court Of West Virginia *Did Not Hold* That The "Due Process Clause Permits A State Court To Apply Its Own State Law" To Cases That "Have No Connection At All To The State."

The second question presented by petitioners is even more obviously not truly presented here. That question is based on a purported "holding" by the State Supreme Court "that the Due Process Clause permits a state court to apply its own state law to thousands of product-liability cases . . . that . . . have no connection at all to the state." Pet. iii. Again, the court below held no such thing—in fact, at the time of the State Supreme Court's decision, the trial court had made *no*

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[8] But, if anything, these cases *support* the decision below. *Todd-Stenberg upheld* a consolidated trial of three personal injury suits involving pelvic inflammatory disease ("PID") contracted as the result of use of the intrauterine device known as the Dalkon Shield. The court held that the "trial court correctly anticipated that a large portion of the trial would be devoted to issues common to the three cases: how PID occurs, whether it can be caused by the use of Dalkon Shield, and what other factors might cause or contribute to the disease." 56 Cal. Rptr. at 17. The same is true here with respect to asbestos-related diseases—hence the West Virginia courts' use of "common issues" trials. Petitioners' second state case, *Union Pacific*, similarly *upheld* certification of a class of plaintiffs holding royalty interests under 590 oil and gas leases (involving 122 unique lease forms and 58 types of royalty clauses) that sought damages against Union Pacific.

ruling whatsoever on the question of what state or states' law should apply in any of the various asbestos trials contemplated by the court's preliminary case management plan, and the State Supreme Court likewise *did not address this issue in any way.*

The opinion of the State Supreme Court nowhere contains the phrase "choice of law," or "law to be applied," or anything remotely similar. And while the petition contains repeated references to a purported "choice-of-law holding,"[9] petitioners' only efforts to cite to this "holding" are a pair of vague references to page "App. 7a." *See* Pet. 10 & 22. There are, however, *no* "holdings" of any sort—let alone a choice-of-law holding—on "App. 7a." That page merely reproduces a portion of the "Procedural Background" section of the lower court's opinion, not any part of the court's legal analysis. And "App. 7a" does not even mention choice of law, or anything related to it.[10]

After the decision below—more than three months after, at an August 12, 2002 hearing—the trial court ruled on choice of law, at the urging of counsel for numerous major defendants. Specifically, Mr. David Hendrickson, counsel for Shell Oil and other defendants in these proceedings, stated to

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[9] *See, e.g.*, Pet. iii, 10,11-12, 21, 22, 26.

[10] Petitioners' statement that the lower court's purported choice of law "holding" applied to only "one group of defendants," suggests that they may be misinterpreting the State Supreme Court's description of the three "trial groupings" contemplated for the "Phase I" proceedings as a ruling on choice of law. As the court below recited at Pet. App. 7a, the trial court had grouped the causes of action alleged by the plaintiffs into three categories: "(1) product liability claims; (2) premises liability claims; and (3) deliberate intent causes of action asserted under West Virginia Code § 23-4-2 (1994)." The final group comprises claims based on the "deliberate intent" provision of West Virginia's Workers' Compensation Act. Clearly, however, nothing in the lower court's reiteration of the categories tentatively established by the trial court constituted a choice of law ruling of any kind.

the presiding judges: "I take it you all haven't made a ruling on [choice of law]. . . . I just would like to know, [as to] . . . common issues . . . whether we are going to deal with that briefly, your Honor." 8/12/02 Tr. 170-71. One of the trial judges responded that the judges intend to "apply West Virginia law in all aspects of the first phase [the "common issues" phase] of this trial." *Id.* at 172. The judge then expressly stated that "to the extent that anybody is aggrieved by that, your objection is noted and preserved" for appeal. *Id.* He also clarified that the ruling did not apply to later phases of the trial: "Right now we are dealing with Phase I. Nobody should read anything into that [choice of law ruling] one way or another" as to later phases. *Id.* at 173.

Accordingly, as of August 12, 2002, petitioners (and the other defendants) *do* have a decision on choice of law as to "Phase I" (and only "Phase I") of the proceedings contemplated by the trial court. Petitioners are, as the trial court suggested, entitled to seek review of that decision in the State Supreme Court at an appropriate time. Until such review takes place, however, it would clearly be premature for this Court to intercede.

B. The "Choice Of Law" Cases Cited By Petitioners Are Irrelevant.

Petitioners argue that the purported "choice-of-law decision" below conflicts with this Court's holding in *Phillips v. Shutts*, 472 U.S. 797 (1985). In *Phillips*, this Court held that in order for a forum state—Kansas, in that case—to apply forum law to claims asserted by a class action, the state "must have a 'significant contact or aggregation of contacts' to the claims asserted by each member of the plaintiff class . . . to ensure that the choice of Kansas law is not arbitrary or unfair." *Id.* at 821-22. Significantly, however, even though some "97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit," *id.* at 814-15, this Court held that there could be no constitutional

defect in Kansas' application of forum law without a prior showing of an actual conflict on issues relevant to the case: "We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit." *Id.* at 816.

In the present case, petitioners have not only failed to demonstrate—either to the courts below or to this Court—any "material" conflict between West Virginia law and that of another state: they have not even made any specific showing of *which* other states' laws might apply to the case. To allege, therefore, that "[t]he decision below, forgoing any inquiry into the existence of contacts sufficient to justify application of forum, cannot be reconciled with the precedent of this Court," Pet. 23, not only misstates what the State Supreme Court actually decided, but also ignores the preliminary conditions that *Phillips* established as a basis for invoking such an inquiry.

The lone "example" that petitioners offer of a "conflict" between West Virginia's products liability law and that of other states is the claim that some states have rejected traditional "pure joint and several liability as fundamentally unfair to defendants." Pet. 25. The sole state authority that petitioners cite in support is a Kansas Supreme Court decision criticizing traditional joint and several liability. *Id.* But petitioners have presented no evidence, either to this court or the courts below, showing that any plaintiffs are properly subject to Kansas law on this issue. Petitioners also ignore the fact that questions of joint and several liability clearly are not "common issues" to be addressed in Phase I of these proceedings, but plaintiff-specific issues to be addressed in the "mini-trials" conducted *after* the "common issues" phase. Pet. App. 28a. Such trials will, of course, present their own choice-of-law issues, and the opportunity to address those issues.

The cases petitioners cite to illustrate lower courts' application of *Phillips* similarly show that petitioners have failed to carry their burden to establish the existence of material conflicts. In *Nicolet, Inc. v. Superior Court*, 224 Cal. Rptr. 408 (Cal. Ct. App. 1986), for example, the California Court of Appeals held that before applying the "governmental interest analysis" required by *Phillips*, the court would first have to "determine whether in fact Pennsylvania law conflicts with California law" on the issues presented. *Id.* at 416. Similarly, the Minnesota Supreme Court inquired into the existence of a material conflict in upholding the application of forum law in *Hime v. State Farm Fire & Casualty Co.*, 284 N.W. 2d 829, 823 n.1 (Minn. 1979). Likewise, in *McBride v. Galaxy Carpet Mills*, 920 F. Supp. 1278 (S.D. Ga. 1995), the district court determined that *Phillips* prevented the application of Georgia law to a nationwide class action, but only after an express finding that an "overwhelming majority of the potential class members purchased carpeting in states other than Georgia" and that, because of a substantive, material conflict, applying Georgia's law of punitive damages "would be unfair to those plaintiffs residing outside the state of Georgia." *Id.* at 1285.[11]

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[11] Petitioners' citation to *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002), in support of their claim that *any* choice of law inquiry would necessarily violate their due process rights, is clearly inapposite. *Bridgestone* had nothing to do with due process; it merely declined Rule 23 certification for a class of owners or lessees of "[m]ore than 60 million tires and 3 million vehicles" in all 50 states. Because "[n]o class action is proper unless all litigants are governed by the same legal rules," due to the "commonality and superiority requirements of Fed. R. Civ. P. 23(a)," the court found that a class of plaintiffs who could not all be properly subject to the laws of a single forum should not be certified. *Id.* at 1015. Of course, since the present case is not a class action—and, indeed, the cases will ultimately be broken into small "mini-trials" for trials on most issues—*Bridgestone* has no application here.

Petitioners have failed to present even a single substantive issue to be tried as part of the common issues phase of the present case on which an actual conflict between West Virginia law and that of another relevant jurisdiction exists. In all likelihood, there are a handful of material conflicts that could potentially arise in connection with adjudication of the issues to be litigated here. But, of course, at this point we, like petitioners, are merely speculating—the only way to determine the nature and number of relevant conflicts is to inquire into them, and the decision that petitioners ask this Court to review did not do so. Accordingly, it would clearly be premature for this Court to intervene.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHRISTOPHER J. WRIGHT *
TIMOTHY J. SIMEONE
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036
(202) 730-1300

* Counsel of Record